Susila a/p S Sankaran v Subramaniam a/l P Govindasamy

HIGH COURT (KUALA LUMPUR) — PETITION FOR JUDICIAL SEPARATION NO 33–2106–11 OF 2011
YEOH WEE SIAM J
17 MAY 2012

Family Law — Matrimonial proceedings — Ancillary hearing — Wife petitioned for judicial separation — Application by wife before hearing of petition for husband to pay high monthly maintenance and to injunct disposal of matrimonial property — Whether application made by way of summons in chambers wrong mode and fatal — Divorce and Matrimonial Proceedings Rules 1980 — Whether application devoid of merit and lacked evidence to support reliefs claimed

Pending the hearing of a petition she had filed against her husband ('RH') for judicial separation, the petitioner ('PW') filed a summons-in-chambers ('encl 7') seeking several interim orders. These included an order that RH pay her interim maintenance of RM13,990 per month plus arrears of maintenance in that sum from the time the parties began living separately, an injunction preventing him from disposing of the matrimonial assets, an order setting aside any such disposition made within the three years prior to the application and an order that he continue to pay the monthly instalments on a car she was using. PW was a retired government servant earning a pension and supplementing her income as a pre-school teacher. RH ran his own business and was managing director of a company and had savings and investments both locally and abroad. At the time of the hearing of encl 7 RH was paying PW a monthly maintenance of RM1,500 plus the monthly hire purchase payments, road tax and insurance for her car.

Held, dismissing encl 7 with liberty to file afresh:

(1) PW had failed to comply with the Divorce and Matrimonial Proceedings Rules 1980 in using the wrong mode of commencement for encl 7. The correct mode for the reliefs she sought was by way of notice of application and not by way of summons in chambers. Since the wrong mode was used, the court had to dismiss the application (see para 27).

(2) Enclosure 7 had no merits. PW's evidence did not support the high interim maintenance she was claiming for. Since RH was paying her monthly maintenance of RM1,500 and also making payments for her car that was sufficient for the interim period considering that PW had her own income and pension as well (see paras 34 & 44).

(3) There was sufficient evidence to show there was no dissipation or

disposition of property by RH within the meaning of s 102 of the Law Reform (Marriage and Divorce) Act 1976 with the object of reducing his means to pay her maintenance or to deprive PW of her rights in relation to any property. There was also no real risk of dissipation or disposition of the properties by RH (see paras 52 & 54).

[Bahasa Malaysia summary

Sementara menunggu pendengaran petisyen yang difailkan olehnya terhadap suaminya ('SR') untuk pemisahan kehakiman, pempetisyen ('IP') memfailkan saman dalam kamar ('lampiran 7') memohon beberapa perintah interim. Ini termasuk perintah bahawa SR membayar dia nafkah interim sebanyak RM13,990 sebulan tambah tunggakan nafkah dalam jumlah tersebut dari masa pihak-pihak mula tinggal secara berasingan, injunksi menghalang dia daripada menjual aset-aset perkahwinan, perintah mengenepikan apa-apa pelupusan sedemikian yang dibuat dalam masa tiga tahun sebelum permohonan tersebut dan perintah bahawa si suami terus membayar bayaran ansuran bulanan kereta yang diguna olehnya. IP adalah kakitangan kerajaan yang bersara yang mendapat pencen dan memberi tambahan kepada pendapatannya sebagai guru pra-sekolah. SR menjalankan perniagaannya sendiri dan adalah pengarah urusan sebuah syarikat dan mempunyai simpanan dan pelaburan di dalam negeri dan luar negara. Pada masa pendengaran lampiran 7 SR membayar IP nafkah bulanan sebanyak RM1,500 tambah bayaran bulanan sewa beli, cukai jalan dan insurans untuk keretanya.

Diputuskan, menolak lampiran 7 dengan kebebasan untuk memfailkan semula:

(1) IP telah gagal untuk mematuhi Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980 dalam menggunakan cara permulaan yang salah untuk lampiran 7. Cara betul untuk relief-relief yang dipohon olehnya adalah melalui notis permohonan dan bukan melalui saman dalam kamar. Memandangkan cara salah digunakan, mahkamah terpaksa menolak permohonan tersebut (lihat perenggan 27).

(2) Lampiran7 tidak mempunyai merit. Keterangan IP tidak menyokong nafkah interim yang tinggi yang dipohon olehnya. Memandangkan SR yang membayar nafkah bulanan sebanyak RM1,500 dan juga membuat bayaran untuk keretanya ini adalah mencukupi untuk tempoh interim dengan mempertimbangkan bahawa IP mempunyai pendapatannya sendiri dan juga pencen (lihat perenggan 34 & 44).

(3) Terdapat keterangan yang mencukupi untuk menunjukkan tidak terdapat pelupusan hartanah oleh SR dalam maksud s 102 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 dengan objek untuk mengurangkan kemampuannya untuk membayar nafkahnya atau menafikan IP hak-haknya berkaitan mana-mana

hartanah. Juga tidak terdapat risiko sebenar pelupusan hartanah-hartanah oleh SR (lihat perenggan 52 & 54).]

Notes

For a case on ancillary hearing, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 4124.

Cases referred to

Leow Kooi Wah v Philip Ng Kok Seng & Anor [1997] 3 MLJ 133, HC (refd)
Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo [2008] 3 MLJ 42; [2008] 2 CLJ 783, CA (refd)
Nguang Chan aka Nguang Chan Liquor Trade & Ors v Hai-0 Enterprise Bhd & Ors [2009] 5 MLJ 40, CA (refd)
PWC (Underwriting Agencies) Ltd v Dixon & Anor [1983] 2 All ER 158, CA (refd)
S & F International Limited v Trans-Con Engineering [1985] 1 MLJ 62; [1983] 2 CLJ 228, FC (refd)
Seema Development Sdn Bhd v Man Kim Chye and another action [1997] MLJU 235; [1998] 1 CLJ 174 (refd)
Shipman v Shipman [1991] 1 FLR 250, CA (refd)
Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam [2002] 3 MLJ 273; [2002] 3 CLJ 300, CA (refd)
Walker v Walker [1983] 4 FLR 455, HC (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 2(1), 3, 56, 56(1), (3), 57, 58, 61, 61(2), (3), 62, 64, 65, 65(4), (5), 67, 91(1)(b), Forms 11, 12, 13, 58
Law Reform (Marriage and Divorce Act) 1976 ss 76, 76(1), (2), (4), 77(1)(a), 102, 102(1)(i), (ii)
Matrimonial Causes Act 1973 [UK] s 37
Rules of the High Court 1980 O 24 r 10(1), O 29, Form 58

SY Chew (CJ Siew with her) (Douglas Yee) for the petitioner wife.
YN Foo (Kiran Dhaliwal and Sharon Tee with her) (YN Foo & Partners) for the respondent husband.

Yeoh Wee Siam J:

[1] This is an appeal by the petitioner wife ('the PW') in respect of my decision made on 4 April 2012 regarding encl 7.

ENCLOSURE 7

[2] Enclosure 7 is an application by the PW filed by way of a summons in

chambers ('the application') for, inter alia, the following interim orders pending the final disposal of the petition for judicial separation ('the petition') in encl 1:

(a) That the Respondent be ordered to pay to the Petitioner interim maintenance of RM 13,990.00 per month, payable into the Petitioner's account on or before 7th day of each month;

(b) That the Respondent be ordered to pay the Petitioner, within 14 days from the date of this Order, the arrears of the interim maintenance commencing from 20th May 2009 until the date of this Order;

(c) That the Respondent by himself, his agents or servants or otherwise be restrained until further order from transferring, disposing off or parting with in any manner the matrimonial assets or a part thereof, including but not limited to those mentioned in paragraphs 27-31 of the Affidavit in Support herein, within and outside the jurisdiction of this Court or to whatsoever person;

(d) An order that any transfer, disposal or parting of the Petitioner's share in the matrimonial assets, within 3 years from the date hereof, be set aside;

(e) That the Respondent be ordered to continue paying the monthly car installments for the Nissan Grand Livina 1.5, Registration No. WSC 8058, pending the disposal of the proceedings herein;

(f) That the Respondent be ordered to pay costs of this application; and

(g) Such further and other relief as this Honourable Court deems fit and just.

BACKGROUND FACTS

[3] The PW was lawfully married to the respondent husband ('the RH') on 20 November 1982. There are no children from the marriage.

[4] After the marriage, the PW and the RH cohabited at various addresses (including residing in New Zealand) and lastly at No AT18-1, Block C, Prima 16, Chapter 2, Seksyen 16, Petaling Jaya, Selangor ('the matrimonial home'). The PW left the matrimonial home on 20 May 2009. Since then, the parties have been living separately.

[5] The PW worked with Lembaga Penduduk dan Pembangunan Keluarga Negara ('LPPKN') for 24 years. She took early retirement in October 2003 when she was earning a gross salary of RM1,614 per month. Since her retirement she was a housewife except in January 2004–April 2004 when she worked as a pre-school teacher. She started working again as pre-school teacher from mid-September 2010 until now in order to support herself.

[6] The respondent runs his own business. He is the managing director of a

company, Trident Plus Sdn Bhd ('Trident Plus'), which he set up in 2002. This company acts as an agent or go-between for two Japanese companies, Sumitomo Electric Industries Japan and Japan Power Systems, earning commissions.

DECISION

[7] I heard the application on 27 March 2012 and 4 April 2012. After considering the application and affidavits, and the submissions and authorities of both parties, I dismissed the application, with liberty to file afresh. I further ordered that the PW pays the RH costs of RM500 within ten days from the date of the order.

GROUNDS FOR MY DECISION

(a) Wrong mode of commencement

[8] Counsel for the RH raised the substantive issue regarding the wrong mode of commencement by the PW for this application. According to Ms YN Foo, the correct mode of commencement for the reliefs sought is by way of a notice of application, and not by way of a summons in chambers.

[9] I fully agree with Ms Foo's submission on the following grounds.

[10] The term 'ancillary relief' has been defined in r 2(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMP Rules') as follows:

> 'ancillary relief' means —
>
> (a) an avoidance of disposition order;
>
> (b) a financial provision order;
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> (c) an order for maintenance pending suit;
>
> (d) a property adjustment order; or
>
> (e) a variation order;.

[11] Prayers (a) and (b) of encl 7 are for the ancillary relief of 'maintenance pending suit'. Prayers (c) and (d) are for the ancillary relief of 'an avoidance of disposition order'.

[12] In the same r 2(1) of the DMP Rules:

> 'avoidance of disposition order' means an order under section 102 of the Act;.

[13] Thus prayers (a), (b), (c) and (d) are basically prayers for ancillary relief under the Law Reform (Marriage and Divorce Act) 1976 ('the LRA') and the DMP Rules.

[14] As correctly pointed out by counsel for the RH, where a party is claiming for an ancillary relief such as a 'maintenance pending suit' and for an 'avoidance of disposition order', as in this application, then she should file a notice of application in Forms 11, 12 or 13, as the case may be, and serve a copy of it on the other party (see rr 56, 61, 64, 65 and 67 of the DMP Rules).

[15] Regarding the use of a notice in the Forms, in *Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo* [2008] 3 MLJ 42; [2008] 2 CLJ 783 at p 789 the Court of Appeal laid down the requirement for a Notice of application to be filed for ancillary relief under r 56(1) and (3) of the DMP Rules by using Form 11, for a variation of a maintenance order, as follows:

> We are of the view the learned judge of the High Court erred in law in holding that the petitioner's application by way of summons in chambers dated 2 November 1998 is procedurally correct and proper when in fact it contravenes the provisions of the rules set out in the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules') read in conjunction with the provision of the Act Rule 2(1) of the 1980 Rules defines 'ancillary relief to mean, inter alia, a variation order which includes an order for maintenance under s 83 of the Act. Rules 56(1) and (3) of the 1980 Rules provide that an application for a variation order, being not an application for ancillary relief which is required to be made in the petition or answer, shall be made by notice in Form 11 as set out in the Schedule to the 1980 Rules. Rule 91(1)(b) of the 1980 Rules provides that except where otherwise provided by the 1980 Rules, every application in a matrimonial proceeding shall be made by summons.
>
> It is our judgment that as rr 56(1) and (3) of the 1980 Rules specifically provide for the mode of application for a variation order, such application thus falls under the exception of r 91(1)(b) of the 1980 Rules. In the premises, the learned judge of the High Court therefore erred in law in holding that r 91(1)(b) of the 1980 Rules applies to every application in matrimonial proceedings including the said application. In our view the learned judge ought to have held that the application should be made by way of Form 11 notice and not by way of summons-in-chambers.

[16] Going by the above rationale of the Court of Appeal, I am of the opinion that, similarly, for an application under Form 12 or 13 of the DMP Rules, the application should be made by way of a notice of application and not by a summons in chambers since Form 11, 12 and 13 of the DMP Rules are of the same genus. The only difference about Forms 11, 12 and 13 is that each Form has to be used at the appropriate stage of the proceedings. In the above case, Form 11 had to be used since the petition for judicial separation had already been disposed of. In the present case, the petition has not been disposed of yet.

[17] Rule 61 of the DMP Rules provides as follows:

> General provisions as to evidence etc on application for ancillary relief
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> 61
>
> (1) A petitioner or respondent who has applied for ancillary relief in his petition or answer and who intends to proceed with the application before a registrar shall, subject to Rule 84, file a notice in Form 12 and within four days after doing so serve a copy on the other spouse.
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> (2) Where a respondent or a petitioner is served with a notice in Form 11 or 13 in respect of an application for ancillary relief, not being an application to which Rule 62 or 63 applies then, unless the parties are agreed upon the terms of the proposed order, he shall, within 14 days after service of the notice, file an affidavit in answer to the application containing full particulars of his property and income, and if does not do so, the court may order him to file an affidavit containing such particulars.
>
> (3) Within 14 days after service of any affidavit under paragraph (2) or within such other time as the court may fix, the applicant shall file an affidavit in reply containing full particulars of his property and income.

[18] Upon service of a notice of application by the applicant (in this case, the PW), then under r 61(2) to the DMP Rules, the respondent (in this case, the RH) 'shall' file an answer to the application stating full particulars of his income and property. After that, under r 61(3) of the same Rules, the applicant has a corresponding mandatory duty to file an affidavit in reply containing full particulars of her income.

[19] After the above steps have been complied with, should the applicant require further information, then the applicant may invoke r 65(4) of the DMP Rules for that purpose.

[20] Rule 65(4) to the DMP Rules of the DMP Rules provides as follows:

> (4) Any party to an application for ancillary relief may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to furnish a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the registrar for directions.

[21] Under r 65(4) of the DMP Rules, the applicant may serve a letter of demand for further information or require the other party to furnish a list of relevant documents or allow inspection of documents.

[22] Should the respondent fail to furnish the information required under r 65(4) of the DMP Rules, then the applicant may apply to the registrar for

directions under r 65(5) of the same Rules. The registrar 'shall' investigate the allegations made and may order the attendance of any person for the purpose of being examined or cross-examined, and may at any stage of the proceedings order the discovery and production of any document or require further affidavit.

[23] Pursuant to r 67 of the DMP Rules, the registrar 'shall', after completing his investigation under r 65, report the result thereof to a judge to whom the application shall be adjourned.

[24] It is clear from the above rules that there are mandatory obligations and specific steps to be taken by the applicant and the court.

[25] In *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133 Mahadev Shankar J (as he then was), in deciding an application for ancillary relief made under r 56(1) of the DMP Rules, held, in relation to the requirements of rr 61(2) and 65(4) of the same Rules as follows:

> (4) Rules 61(2) and 65(4) of the Rules impose upon the parties a spontaneous duty to exercise utmost good faith in making the fullest disclosure of relevant information. Whatever disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath, the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings.

[26] From *Leow Kooi Wah* it is clear that rr 61(2) and 65(4) of the DMP Rules would only 'kick in' or apply when, in the first place, the application for ancillary relief is made by way of a notice of application, and not when the application is commenced by way of a summons in chambers.

[27] In the present case, the applicant failed to comply with the requirements of the above relevant provisions of the DMP Rules. This application in encl 7 was filed by the PW by a summons in chambers, and not by a notice of application. Since the wrong mode of commencement was used, the court dismissed the application.

[28] Apart from the above ground for my decision, I also am mindful of r 91(1) of the DMP Rules which provides as follows:

> Mode of applied making applications
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>
> (1) Except where these Rules or any rules by these Rules, otherwise provide, every application in matrimonial proceedings —
>
> (a) shall be made to a registrar;

(b) shall if the proceedings are pending in the High Court, be made by summons or, if the proceedings are pending in a Sessions Court in West Malaysia or a First Class Magistrate's Court in east Malaysia, be made in accordance with Subordinate Courts Rules 1980 Order 6 Rule 1 (applications in the course of proceedings).

[29] In my view, the liberty to use a summons in chambers for an application in proceedings which are pending in a High Court under r 91(1)(b) of the DMP Rules is only to the extent that there are no other specific provisions to require the filing of such application by some other mode. However, where there are specific provisions in rr 56, 57, 58, 61, 62 and 65 of the DMP Rules requiring an application to be filed by a notice of application under Form 11, 12 or 13, as the case may be, then the applicant is not allowed to file such application by a summons in chambers.

[30] Thus, it is erroneous for the PW to file encl 7 by way of a summons in chambers.

[31] At this juncture, I would also state here that in view of what I hold regarding the requirements of rr 61, 65(4) and 67 of the DMP Rules, and in view of what was held in *Leow Kooi Wah* regarding rr 61(2) and 65(4) of the DMP Rules, the notice to produce filed by the PW in encl 16 for the purpose of the hearing on encl 7 is inappropriate. I assume that the notice to produce is filed under O 24 r 10(1) of the Rules of the High Court 1980 ('the RHC') since no particular section of any law is cited in the notice. Such notice to produce under the RHC should only be filed in relation to documents that have been referred to in the pleadings and affidavits (see the marginal notes to O 24 r 10(1) of the RHC, and the Court of Appeal case of *Nguang Chan aka Nguang Chan Liquor Trade & Ors v Hai-0 Enterprise Bhd & Ors* [2009] 5 MLJ 40). In my view, the specific procedures in rr 64–65 of the DMP Rules should be adhered to by the PW. The PW should not embark on using a notice to produce issued under the RHC without first complying with the requirements of the DMP Rules to obtain further information and documents from the RH.

[32] It should also be noted here that at the outset of the hearing on encl 7, counsel for the PW applied to the court to exclude and not consider the RH's affidavit in reply (2) affirmed on 16 March 2012 and filed on 19 March 2012 (encl 17) on the basis that it was filed after the date allowed by the senior assistant registrar ('the SAR') during case management. Based on that preliminary objection on a technical ground, I allowed the PW's application and ruled that encl 17 should be excluded. However, subsequently, as the hearing of encl 7 proceeded, it was submitted by counsel for the RH that encl 17 was filed in response to the PW's notice to produce which was filed on 14 March 2012. On hindsight, after the Hearing of encl 7 was over, I find that

counsel for the PW had not been consistent in her stand and had not been fair to the RH for applying to exclude encl 17 in the first place. The PW cannot, on one hand, use the notice to produce to require the RH to produce documents and other information for the purpose of the hearing on encl 7, and on the other hand, apply to shut up the RH from disclosing the documents and information (required to be produced by the notice to produce) in encl 17.

(b) No merits to the application

[33] Strictly speaking, by deciding in the above that the PW had commenced the application by the wrong mode, this court does not have to decide on the merits of the application in encl 7.

[34] However, notwithstanding the failure of the PW to file her application by the correct mode of commencement, I am also satisfied, based on the evidence, that the application has no merits and ought to be dismissed.

(i) Interim maintenance for the PW

[35] This application in encl 7 is only for interim maintenance pending the disposal of the petition. The final order regarding maintenance for the wife would be made after the hearing of the petition.

[36] The evidence shows that the PW's current salary is about RM1,600. She has a monthly pension of RM803,08. The evidence also shows that occasionally the PW can earn some extra money from providing transportation for the school, or for a school child (eg RM400 x 2 times, as was previously done by her). The average monthly income of the PW is about RM2,403.08. The PW gets an occasional annual bonus from the Government for her pension. Her monthly rental is about RM1,300 per month. The PW's evidence does not support her contention that her monthly rental should be based on that of a bungalow, namely, for RM7,000. The evidence shows that for 26 years, the parties have lived in nine homes at various rentals, one of which was at a low rental of RM700 per month (see para 14 of the RH's affidavit in reply in encl 11). The court noted that the PW's current rental is less than the RH's monthly rental of RM2,000.

[37] The court considered the RH's monthly income of RM5,500 per month. The PW alleged that the RH gets RM8,000 per month from the rental of the two properties in New Zealand. In exh SG18 of encl 11, at pp 128–129, I noted that the average monthly rental of the properties in New Zealand, based on the balance of NZD7,764.80 over 90 days, is about NZD2,588.066.

[38] There appears to be no justification for a claim by the PW for a full-time

live-in maid. Before the separation of the PW and RH, they only had a part-time cleaner to clean their condominium fortnightly.

[39] There is no evidence adduced by the PW of her regular monthly medical bills for medical treatment. The PW is a government pensioner with medical benefits and she can seek free treatment or treatment for a nominal fee at government hospitals. The PW alleged that she has a degenerative disc problem. The RH proved that he too has a spinal problem from as early as 11 October 2002 (see exh SG20 at p 135 of encl 11). Unlike the PW, the RH is not a government pensioner, and he has to go to a private hospital for paid care, if required.

[40] I further considered the fact that the RH is currently paying for the PW's monthly car instalments and her road tax and car insurance ('her payments for the car').

[41] At this stage, the court would not allow the PW to be given an interim maintenance of RM13,990, as claimed by her. Her evidence does not support such a high interim maintenance. The court is not persuaded by her counsel to set precedent by ordering the RH to use part of the matrimonial assets to pay for the PW's interim monthly maintenance. In my opinion, all matrimonial assets should be left intact, and should not be disposed of at this interim stage until a final order is made by the court for division of the assets under s 76 of the LRA, upon the decree of judicial separation being made after the hearing of the petition.

[42] Section 77(1)(a) of the LRA empowers the court to order maintenance to a wife during the course of any matrimonial proceedings.

[43] There is no provision in the LRA for any interim order to be made for the disposal of matrimonial assets, in particular for the interim maintenance of a wife.

[44] In my opinion, since the RH is now giving the PW a monthly maintenance of RM1,500 per month and also the payments for the car, this is sufficient for the interim period, considering that the PW has her own income and pension as well. This is a 2011 case and currently the family court has less than 125 cases left from 2011 to be heard (see the court's statistics for April 2012). It is just a matter of only a few more months before the petition is heard, after which a final order would be made for the PW's maintenance.

(ii) Injunction

[45] The PW made the application for an injunction under s 102 of the LRA and/or O 29 of the Rules of the High Court 1980 ('the RHC') and/or the inherent powers of the court.

[46] Rule 3 of the DMP Rules provides as follows:

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(1) Subject to these Rules and to any other Application of written law, the Subordinate Courts Rules 1980 otherrules-and the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Sessions Court in West Malaysia or the First Class Magistrate's Court in East Malaysia and in the High Court respectively.

(2) For the purposes of paragraph (1), any provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were, in the case or proceedings pending in the High Court, a provision of the Rules of the High Court 1980.

[47] From the above r 3, it is clear that the provisions of the LRA and the DMP Rules would apply to matrimonial proceedings. Where there are no specific provisions in these laws on a matter, then other relevant written laws, such as the RHC, would apply.

[48] Regarding the matter of injunctions on property, s 102 of the LRA has specifically provided as follows:

102 Power for court to set aside and prevent dispositions intended to defeat claims to maintenance

(1) Where —

(a) any matrimonial proceeding is pending;

(b) an order has been made under section 76 and has not been complied with;

(c) an order for maintenance has been made under section 77 or 93 and has not been rescinded; or

(d) maintenance is payable under any agreement to or for the benefit of a spouse or former spouse or child,

the court shall have power on application —

(i) if it is satisfied that any disposition of property has been made by the spouse or former spouse or parent of the person by or on whose behalf the application is made, within the preceding three years, with the object on the part of the person making the disposition of reducing his or her spouse of any rights in relation to that property, to set aside the disposition; and

(ii) if it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition.

(2) For the purposes of this section —

'disposition' includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred or encumbered but does not include a disposition made for money or money's worth to or in favour of a person acting in good faith and in ignorance of the object with which the disposition is made;

'property' means property of any nature, movable or immovable, and includes money.

[49] Prayer (c) of the application is for an injunction preventing any disposition of property. This matter has to considered under s 102(1)(ii) of the LRA.

[50] Prayer (d) of the application is for setting aside any disposition of property within three years from the date 'hereof'. This matter has to be considered under s 102(1)(i) of the LRA.

[51] The issue is whether the RH had already made any disposition of property in the preceding three years, and/or whether he would be making any disposition of property, with the object of reducing his means to pay maintenance to the PW or to deprive her of any rights to such property.

[52] Under s 76 of the LRA, the court has the power, inter alia, to order the division of matrimonial assets when making a decree of judicial separation. Thus, the term 'property' in s 102 of the LRA, by logical deduction, refers to the matrimonial assets of the parties.

[53] From a perusal of the RH's affidavit in reply affirmed on 20 January 2012 (encl 11), it is noted that the RH appears to be co-operative, and had disclosed the bulk of his properties. Had it not been for the PW's application to exclude the RH's second affidavit in reply affirmed on 16 March 2012 (encl 17), it would have been made clearer to the PW by the RH through a fuller disclosure on the whereabouts and current status of the properties.

[54] Despite the fact that the disclosure by the RH in encl 17 could not be considered by the court here (in view of the PW's earlier application to exclude encl 17), in my opinion, even with the RH's disclosure in encl 11, there is sufficient evidence to show that there is no dissipation or disposition of property within the meaning of s 102 of the LRA, with the object of reducing the RH's means to pay maintenance or to deprive the PW of her rights in

relation to any property.

IMMOVABLE PROPERTIES

[55] As submitted by counsel for the RH, all the immovable properties are still there, and not dissipated. Their current status is as follows:

(1) The property at E-9-15 & E-9-16 AMCORP Business Suites is the property of the Company, Trident Plus.

(2) Except for the property at No 241, Weymouth Road, Auckland, which is in joint names, the other two are in the sole name of the RH, namely:

(i) B-6-5 Venus Tower, Pelangi Condo Mont Kiara;

(ii) No 7 Corolu Place, Auckland (Corolu Place has a loan outstanding which requires to be serviced every month.).

SHARES

[56] In encl 11, the RH had disclosed his number of shares held in AP Land, Time, Tradewinds, Suremax, TA Win, YCS and OPCOM. In his bursa statement in exh SG16, he had also disclosed that some warrants, ie Time W, TH Group and TH Group W, have expired.

[57] There is no evidence of dissipation of the above shares held by the RH.

EPF

[58] From exh SG15 of enclosure 11, there is proof of the RH's withdrawal of all his EPF money ie RM439,724 in October 2004 before the RH and the PW moved to New Zealand.

[59] It is clear that the RH's EPF money was withdrawn during the time the parties were together and it formed part of the money which the parties had repatriated to New Zealand. The PW cannot now allege that the RH dissipated the EPF money by the act of repatriation.

[60] In para 20.4 of encl 11, the RH disclosed that he had lost money in New Zealand in the EVP Holdings Investment ('EVP') ie an equivalent of RM510,480.26. The PW in para 12(a) of her second affidavit affirmed on 1 March 2012 (encl 15) alleged that it was the EPF money that was used for the EVP investment.

[61] The EVP loss incurred by the RH was during the time that the marriage subsisted. That cannot be taken as dissipation of property by the RH. (See also

Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam [2002] 3 MLJ 273; [2002] 3 CLJ 300 for the rationale that there is no authority requiring that the court must do an accounting of all past income and expenditure during the marriage.)

BANK ACCOUNTS

[62] The RH had disclosed fully his bank accounts in Table A of exh SG12 of encl 11. Table B of the same exhibit shows the movement of funds to New Zealand. The RH stated that he only has the following funds in bank accounts:

(a) MBB structure fund RM300,000;

(b) savings in New Zealand RM1,051,184.83; and

(c) Hong Leong Bank Penang stock 87,381 units.

[63] In exh SG12 of encl 11, Tables A and B show that the money transferred to New Zealand is still there, and can be accounted for by the RH. Had encl 17 not been excluded upon the PW's application, the PW would have been informed again (apart from the first disclosure in encl 11) by the RH that the RM750,000 transferred to New Zealand now constitutes part of the savings of RM1,051,184.53 together with the rental income of the two properties (see also exh SG18 of encl 11 on the summary of New Zealand Bank accounts as at 16 March 2012 totaling RM1,051,184.83). The PW would also have been informed by a further disclosure by the RH in encl 17 that he has another sum of RM225,679.62 in his bank account.

[64] The RH had also disclosed in the same exh SG12 that he only uplifted the following sums after the PW left him:

(a) CIMB Pr Small Cap F-2: RM64,011.79 (uplifted in August 2011); and

(b) CMS Premier Fund: RM20,079.67 (uplifted in April 2011).

[65] The RH further disclosed that the rest of the monies were uplifted and utilised during their marriage when they were living together (see Table A of exh SG12 of encl 11).

[66] The PW relied on some handwritten scribbled piece of paper and some typewritten document alleged to have been drawn up by the RH, which the RH denied, regarding the existence of further matrimonial assets. At this juncture, the court would only consider the facts which are not in dispute. In any case, no evidence by a handwriting expert has been adduced by the PW to prove that the RH is the maker of the scribbled notes.

[67] From Tables A and B in exh SG12 of encl 11, the court is satisfied that there is no disposition or dissipation by the RH to the point where he would be reducing his means to pay maintenance or to deprive the PW of her share of the property.

[68] The RH admitted that he was using part of his savings because his net income of RM1,808.36 is less than his monthly expenses. There is a shortfall of RM2,191.64 per month (see Table B in exh SG12 of encl 11). In my opinion, this amount of disposition is not such a huge amount to the extent that the RH has substantially reduced means and would no longer be able to pay the PW her maintenance or to deprive her of her share of the property.

[69] Regarding the shares in the company, Trident Plus, the PW's contention is that she did not resign as a director. However, the RH stated that she did. In my view, that should be the subject matter of a full trial, and not for this application.

[70] At this juncture; the court noted that apart from the 1% or 1,000 shares which the RH transferred to his nephew, K Saravanan a/l Kanniah, the remaining 24,000 shares previously held by the PW have been transferred and are now held by the RH. The 24,000 shares still exist and would be in the pool of matrimonial assets to be finally divided by the court at the hearing of the petition.

[71] It must be borne in mind that the evidence shows that at all times the RH was earning far more than the PW who had a very low monthly income during the marriage when the matrimonial assets were acquired. Under s 76(1) and (2) of the LRA, if both parties had contributed by their joint efforts in acquiring the matrimonial assets, the court shall incline towards equality of division. However, under s 76(4) of the LRA, the party by whose effort the assets were acquired shall receive a greater proportion.

[72] Going by the evidence adduced so far, since the RH had made more monetary contributions than the PW towards acquiring of the matrimonial assets, he shall receive a greater proportion of the assets. During the hearing of the petition in encl 1, if the evidence is in her favour, at the most, the PW would be given 50% of the matrimonial assets.

[73] On the whole, I find that the RH has not dissipated or disposed of the properties to the extent that his obligation to pay the PW's maintenance is reduced, or he has deprived the PW from 50% share of the matrimonial assets.

[74] The RH has already disclosed the bulk of the properties to the court. He is now bound by his disclosure and would be accountable to the court if, subsequent to this, it is proven by the PW that the properties disclosed have been dissipated or disposed of by the RH.

[75] In *Seema Development Sdn Bhd v Man Kim Chye and another action* [1997] MLJU 235; [1998] 1 CLJ 174, Abdul Hamid Embong J (as His Lordship then was) at p 178 stated:

> There is no scarcity of authorities stating that the most important ingredient to consider before granting a mareva injunc5ion, is whether there is any real danger of the assets being dissipated. See *Ang Chee Huat v Thomas Joseph Engelbach* [1995] 2 AMR 1323, where the Court of Appeal agreed with Peh Swee Chin J in *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261 where the learned judge held that 'The risk of dissipation was not just a mere possibility, but almost a certainty.'.

[76] From the evidence, I am satisfied that there is no real risk of dissipation or disposition of the properties by the RH.

[77] The balance of convenience tilts in favour of the RH. I considered the fact that Trident Plus is the RH's sole source of income. If an injunction is issued regarding the RH's business in the company, this would cause hardship to the RH in operating his business.

[78] In *S & F International Limited v Trans-Con Engineering* [1985] 1 MLJ 62; [1983] 2 CLJ 228 at p231 the Federal Court, inter alia, cited *PWC (Underwriting Agencies) Ltd v Dixon & Anor* [1983] 2 All ER 158 which sets out the policy underlying the mareva jurisdiction, where it was held that 'the sole purpose of a mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, and that remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action.'.

[79] In this case, the PW's failure to give a specific undertaking as to damages was not held against her. This is in view of the fact that s 102 of the LRA is silent on the requirement of an undertaking as to damages. An undertaking for

damages is only required if a party relies solely on O 29 and Form 58 of the RHC, and in particular where damage or loss may be caused to the property of a third party.

[80] I find that the PW's evidence falls short of that which is necessary to satisfy the court that the RH is about to enter into any transactions that would require the PW to seek the relief provided in s 102 of the LRA (see *Walker v Walker* [1983] 4 FLR 455 where s 37 of the Matrimonial Causes Act 1973, which is similar to our s 102 of the LRA, was considered).

[81] I considered the following principles laid down in *Shipman v Shipman* [1991] 1 FLR 250 where the Anthony Lincoln J in the Family Division stated:

> (3) The court had an inherent jurisdiction to freeze assets which might be put beyond the reach of the applicant, notwithstanding the enactment of s 37. The decision of *Roche v Roche* [1981] 11 Fam Law 243, in which the Court of Appeal exercised such a jurisdiction, was binding on this court, not having been expressly disproved in *Richards v Richards* [1984] AC 174 and having been followed by Sheldon J in *Walker v Walker* (1983) 4 FLR 455.
>
> (4) The court, in deciding whether to exercise its inherent jurisdiction to restrain the husband, was not required to have regard to the many restrictions and safeguards surrounding the use of worldwide mareva injunctions and to assimilate the use of and procedure for injunctions in the Family Division to those in commercial law. The matrimonial field called for a different approach. If the injunction were discharged the husband could change his intentions, however genuine and well-disposed to his wife his present state of mind might be. Both he and the assets were out of the jurisdiction. Left without a job and with new responsibilities, he would be faced with the temptation to eat into the whole of the fund. Accordingly, on the facts, the assets should be preserved by the injunction being continued.

[82] Going by the totality of the evidence adduced, and after considering the legal principles to be applied, I am satisfied that there is no necessity or justification for the court to grant the injunctive reliefs sought by the PW.

[83] I therefore ordered accordingly.

Eenclosure 7 dismissed with liberty to file afresh.

Reported by Ashok Kumar